

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOYCE D. BIRR,)	
)	No. CV-10-369-JPH
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 23, 2012 (ECF Nos. 13, 15). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Gerald J. Hill represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge (ECF No. 7). On October 5, 2011, plaintiff filed a reply (ECF No. 17). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (ECF No. 13).

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) and disability insurance benefits (DIB) on December 1, 2007, alleging onset as of January 11, 2006, due to depression, seizure disorder, tendinitis, and bipolar disorder (ECF No. 10 at 130-134, 158). Her applications were denied initially and on reconsideration (ECF No. 10 at 77-80, 82-86)

1 Administrative Law Judge (ALJ) Robert S. Chester held a
2 hearing on November 18, 2009. Plaintiff, represented by counsel,
3 and psychological and vocational experts, testified (ECF No. 10 at
4 32-72). On December 7, 2009, the ALJ found plaintiff is not
5 disabled (ECF No. 10 at 24). The Appeals Council denied review on
6 September 15, 2010 (ECF No. 10 at 1-3), making the ALJ's decision
7 the final decision of the Commissioner. Final decisions are
8 appealable to the district court pursuant to 42 U.S.C. § 405(g).
9 Plaintiff filed this action for judicial review on October 22,
10 2010 (ECF No. 10 at 1, 4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, and the briefs of the parties. The
14 Court summarizes them briefly.

15 Plaintiff was 49 years old at the hearing and has a GED. She
16 has worked as a molding injector, nurse's assistant, customer
17 services representative, and small products assembler (ECF No. 10
18 at 44-45, 61-63). At times she has lived alone, and at other times
19 with her mother (ECF No. 10 at 47, 55-56, 251, 397). On an average
20 day she can sit for an hour, stand for a few hours, and lift up to
21 25 pounds. She has sleep problems. When ankles swell she is only
22 able to walk 3-4 blocks. Plaintiff experiences hip and back pain
23 (ECF No. 10 at 49, 52-54).

24 She had mental health treatment in 2009 (Ex. 10 at 533-557).
25 Also in 2009, plaintiff had a grand mal seizure after running out
26 of anti-convulsant medication and being "stressed" (ECF No. 10 at
27 48-49, 527). She takes care of her dog, cooks easy meals, does the
28 dishes, vacuums, mops, sweeps, does laundry, drives, goes to

1 church, plays computer games, and shops (ECF No. 10 at 50, 52, 55,
2 58, 142-145).

3 SEQUENTIAL EVALUATION PROCESS

4 The Social Security Act (the Act) defines disability
5 as the "inability to engage in any substantial gainful activity by
6 reason of any medically determinable physical or mental impairment
7 which can be expected to result in death or which has lasted or
8 can be expected to last for a continuous period of not less than
9 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
10 also provides that a Plaintiff shall be determined to be under a
11 disability only if any impairments are of such severity that a
12 plaintiff is not only unable to do previous work but cannot,
13 considering plaintiff's age, education and work experiences,
14 engage in any other substantial gainful work which exists in the
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
16 Thus, the definition of disability consists of both medical and
17 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
18 (9th Cir.2001).

19 The Commissioner has established a five-step sequential
20 evaluation process for determining whether a person is disabled.
21 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
22 is engaged in substantial gainful activities. If so, benefits are
23 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,
24 the decision maker proceeds to step two, which determines whether
25 plaintiff has a medically severe impairment or combination of
26 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

27 If plaintiff does not have a severe impairment or combination
28 of impairments, the disability claim is denied. If the impairment

1 is severe, the evaluation proceeds to the third step, which
2 compares plaintiff's impairment with a number of listed
3 impairments acknowledged by the Commissioner to be so severe as to
4 preclude substantial gainful activity. 20 C.F.R. §§
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
6 App. 1. If the impairment meets or equals one of the listed
7 impairments, plaintiff is conclusively presumed to be disabled.
8 If the impairment is not one conclusively presumed to be
9 disabling, the evaluation proceeds to the fourth step, which
10 determines whether the impairment prevents plaintiff from
11 performing work which was performed in the past. If a plaintiff is
12 able to perform previous work, that Plaintiff is deemed not
13 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
14 this step, plaintiff's residual functional capacity (RFC)
15 assessment is considered. If plaintiff cannot perform this work,
16 the fifth and final step in the process determines whether
17 plaintiff is able to perform other work in the national economy in
18 view of plaintiff's residual functional capacity, age, education
19 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

21 The initial burden of proof rests upon plaintiff to establish
22 a *prima facie* case of entitlement to disability benefits.
23 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
24 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
25 met once plaintiff establishes that a physical or mental
26 impairment prevents the performance of previous work. The burden
27 then shifts, at step five, to the Commissioner to show that (1)
28 plaintiff can perform other substantial gainful activity and (2) a

1 "significant number of jobs exist in the national economy" which
2 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
3 Cir. 1984).

4 STANDARD OF REVIEW

5 Congress has provided a limited scope of judicial review of a
6 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
7 the Commissioner's decision, made through an ALJ, when the
8 determination is not based on legal error and is supported by
9 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
10 Cir.1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.1999).

11 "The [Commissioner's] determination that a plaintiff is not
12 disabled will be upheld if the findings of fact are supported by
13 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
14 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
15 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
16 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*
17 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
18 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
19 Cir.1988). Substantial evidence "means such evidence as a
20 reasonable mind might accept as adequate to support a conclusion."
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations
22 omitted). "[S]uch inferences and conclusions as the [Commissioner]
23 may reasonably draw from the evidence" will also be upheld. *Mark*
24 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
25 Court considers the record as a whole, not just the evidence
26 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
27 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648
28 F.2d 525, 526 (9th Cir.1980)).

1 It is the role of the trier of fact, not this Court, to
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
3 evidence supports more than one rational interpretation, the Court
4 may not substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
6 (9th Cir.1984). Nevertheless, a decision supported by substantial
7 evidence will still be set aside if the proper legal standards
8 were not applied in weighing the evidence and making the decision.
9 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
10 433 (9th Cir.1987). Thus, if there is substantial evidence to
11 support the administrative findings, or if there is conflicting
12 evidence that will support a finding of either disability or
13 nondisability, the finding of the Commissioner is conclusive.
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

15 ALJ'S FINDINGS

16 The ALJ found plaintiff's DIB coverage lasted through June
17 30, 2011. At step one, he found she did not engage in substantial
18 gainful activity after onset on January 11, 2006 (ECF No. 10 at
19 11, 13). At steps two and three, he found plaintiff suffers from
20 major depressive disorder, generalized anxiety disorder,
21 hyperlipidemia, and left shoulder impingement syndrome,
22 impairments that are severe but do not alone or combination meet
23 or medically equal a Listed impairment (ECF No. 10 at 13, 15). The
24 ALJ found plaintiff less than completely credible. He assessed an
25 RFC for a range of medium work (ECF No. 10 at 17, 19). At step
26 four, he found plaintiff is able to perform past relevant work as
27 an injection molding machine operator, nurse's assistant, and
28 small products assembler (ECF No. 10 at 23). The ALJ found

1 plaintiff is not disabled as defined by the Social Security Act
2 (ECF No. 10 at 24).

3 ISSUES

4 Plaintiff contends the Commissioner failed to properly weigh
5 credibility and the medical evidence (ECF No. 14 at 10-11).
6 Specifically, she alleges the ALJ failed to give specific and
7 legitimate reasons for rejecting the contradicted opinions of
8 examining psychologists Dalley and Brown. She alleges the ALJ's
9 credibility determination is not supported by clear and convincing
10 reasons. The Commissioner asks the Court to affirm, asserting the
11 ALJ's decision is supported by the evidence and free of harmful
12 legal error (ECF No. 16 at 6).

13 DISCUSSION

14 A. Standards for weighing medical evidence

15 In social security proceedings, the claimant must prove the
16 existence of a physical or mental impairment by providing medical
17 evidence consisting of signs, symptoms, and laboratory findings;
18 the claimant's own statement of symptoms alone will not suffice.
19 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
20 on the basis of a medically determinable impairment which can be
21 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
22 medical evidence of an underlying impairment has been shown,
23 medical findings are not required to support the alleged severity
24 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
25 1991).

26 A treating physician's opinion is given special weight
27 because of familiarity with the claimant and the claimant's
28 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.

1 1989). However, the treating physician's opinion is not
2 "necessarily conclusive as to either a physical condition or the
3 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
4 751 (9th Cir.1989)(citations omitted). More weight is given to a
5 treating physician than an examining physician. *Lester v. Chater*,
6 81 F.3d 821, 830 (9th Cir.1995). Correspondingly, more weight is
7 given to the opinions of treating and examining physicians than to
8 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
9 (9th Cir.2004). If the treating or examining physician's opinions
10 are not contradicted, they can be rejected only with clear and
11 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
12 ALJ may reject an opinion if he states specific, legitimate
13 reasons that are supported by substantial evidence. See *Flaten v.*
14 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
15 1995).

16 In addition to the testimony of a nonexamining medical
17 advisor, the ALJ must have other evidence to support a decision to
18 reject the opinion of a treating physician, such as laboratory
19 test results, contrary reports from examining physicians, and
20 testimony from the claimant that was inconsistent with the
21 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
22 751-52 (9th Cir.1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9th
23 Cir.1995).

24 **B. Medical evidence and credibility**

25 Plaintiff alleges the ALJ rejected the contradicted opinions
26 of Mahlon Dalley, Ph.D., and Debra Brown, Ph.D., for reasons that
27 are not specific and legitimate (ECF Nos. 14 at 11-17 and 17 at 1-
28 3).

1 The Commissioner responds that the ALJ's reasons are specific
2 and legitimate. First, the ALJ gave little weight to Dalley's
3 opinions because they were given in order to determine plaintiff's
4 eligibility for state benefits, a system with different
5 definitions and categories than those in the Act (ECF No. 16 at
6 13, citing ECF No. 10 at 23).

7 The Commissioner adds (1) vocational assessments are reserved
8 for the ALJ; (2) Dr. Dalley did not complete or adopt the assessed
9 marked and moderate functional limitations noted by his coworkers,
10 but simply authorized their release; and (3) there is conflicting
11 significant probative evidence (including medical opinions,
12 plaintiff's activities, and her inconsistent statements), which
13 the ALJ properly set forth in detail and explained.

14 As conflicting significant probative medical evidence, the
15 Commissioner cites an opinion by treatment provider Dr. Metcalf in
16 July 2006 (six months after onset) that plaintiff's seizures and
17 depression "are doing well." (ECF No. 16 at 11-12, citing ECF No.
18 10 at 264).

19 Next, the Commissioner cites Dr. Metcalf's August 2007
20 opinion that plaintiff's mental status "again looked great,"
21 although the Commissioner acknowledges plaintiff reported at this
22 appointment "she got into serious emotional problems the preceding
23 winter" (ECF No. 16 at 12, citing ECF No. 10 at 261-262).

24 In between Dr. Metcalf's two opinions described above, on
25 April 12, 2007, Abigail Osborne-Elmer, M.S., examined plaintiff
26 (ECF No. 10 at 245-255). Dr. Dalley signed the report (ECF No. 10
27 at 255). Contrary to the Commissioner's argument, Dr. Dalley
28 indicated he adopted as his "own the accuracy, objectivity,

1 validity, findings and conclusions of the above report and accept
2 responsibility for the contents" (Id.).

3 The remaining "conflicting significant probative" medical
4 opinion evidence cited by the Commissioner consists of the opinion
5 of an agency reviewing psychologist and that of the testifying
6 psychologist, Dr. Klein (ECF No. 16 at 12-14), both entitled to
7 less weight than an examining source. Dr. Klein opined rather
8 vaguely that plaintiff's mental health symptoms of depression and
9 anxiety do not much interfere with job activity (ECF No. 10 at
10 39).

11 The Commissioner asserts the ALJ properly relied on
12 plaintiff's activities and inconsistent statements as additional
13 support for rejecting Dr. Dalley's three assessments (ECF No. 16
14 at 11-14).

15 To aid in weighing the conflicting medical evidence, the ALJ
16 evaluated plaintiff's credibility. Credibility determinations bear
17 on evaluations of medical evidence when an ALJ is presented with
18 conflicting medical opinions or inconsistency between a claimant's
19 subjective complaints and diagnosed condition. See *Webb v.*
20 *Barnhart*, 433 F.3d 683, 688 (9th Cir.2005).

21 It is the province of the ALJ to make credibility
22 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
23 1995). However, the ALJ's findings must be supported by specific
24 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
25 1990). Once the claimant produces medical evidence of an
26 underlying medical impairment, the ALJ may not discredit testimony
27 as to the severity of an impairment because it is unsupported by
28 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.

1 1998). Absent affirmative evidence of malingering, the ALJ's
2 reasons for rejecting the claimant's testimony must be "clear and
3 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995).
4 "General findings are insufficient: rather the ALJ must identify
5 what testimony not credible and what evidence undermines the
6 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
7 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

8 The ALJ notes plaintiff's activities have not been limited to
9 the extent one would expect given her complaints of disabling
10 symptoms and limitations (ECF No. 10 at 14-16). After plaintiff
11 stopped working in 2006, she cared for her grandmother and
12 daughter who were ill. Six months after onset, she needed a note
13 from her doctor because she was setting up a daycare. For six
14 months, plaintiff's granddaughter lived with her and her mother.
15 Plaintiff told her counselor she managed as a single parent, took
16 the child to school, and supervised her homework. Plaintiff has
17 reported she has been able to drive, shop for groceries, do
18 laundry, cook, wash dishes, mop, vacuum, clean, care for and groom
19 a dog, play computer games, and go to church - including telling
20 her primary doctor she was "very active with her church." (ECF No.
21 10 at 19, 45, 47, 50, 59, 158-159, 167-168, 178-182, 204, 206-208,
22 210, 251, 264, 297, 343, 360, 380, 397, 541, 560). Nine days
23 before the hearing she told Dr. Metcalf she was thinking of going
24 back to work (Ex. 10 at 564).

25 When evaluating medical opinions and a claimant's credibility
26 as to limitations, daily activities and inconsistent statements
27 are two valid factors the ALJ considers. See *Thomas v. Barnhart*,
28 278 F.3d 947, 958-59 (9th Cir.2002)(proper factors include

1 inconsistencies in plaintiff's statements, inconsistencies between
2 statements and conduct, and extent of daily activities).

3 The ALJ's reasons are clear, convincing, and supported by the
4 record. Although the evidence of plaintiff's activities may also
5 admit of an interpretation more favorable to plaintiff, the ALJ's
6 interpretation was rational and must be upheld where the evidence
7 is susceptible to more than one rational interpretation. See
8 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.1989).

9 The ALJ made an incorrect reference to the record:

10 "Based on these imaging studies, the claimant's primary care
11 provider recommended that the claimant stay active and that she
12 was very active with her church. (Ex. 14F)."
13 (Ex. 10 at 14).

14 Exhibit 14F is the May 2009 psychological evaluation by Debra
15 Brown, Ph.D. See Ex. 10 at pages 389-398, marked as Exhibit 14F.

16 It appears the ALJ meant to refer to the records of
17 plaintiff's primary care provider, Dr. Metcalf. In September 2007,
18 Dr. Metcalf states: "Plan to increase activity and look for a job
19 to help depression." (Ex. 10 at 260). In June 2008, he notes
20 "Increase activity." (Ex. 10 at 363). A month later, in July, "Get
21 back to work." (Ex. 10 at 358). Finally, the day before the
22 hearing, on November 17, 2009, Dr. Metcalf notes "[i]s very active
23 with the LDS church." (ECF no. 10 at 560). The incorrect record
24 reference is clearly a harmless scrivener's error.

25 However, other error is harmful. The ALJ gives little weight
26 to "these reports" (Ex. 10 at 22-23, citing original exhibits 1F,
27 5F, 9F, and 14F). They are the 4/18/07, 9/25/07, and 4/23/08
28 Dalley assessments, and Dr. Brown's 5/14/09 assessment (ECF No. 10

1 at 245-255, 295-305, 337-346, 389-398). First, the ALJ states
2 these reports

3 "were done with little explanation as to how the medical
4 professionals arrived at their conclusions. Opinions rendered on
5 form reports which do not contain significant explanation of the
6 basis for conclusions may appropriately be accorded little or no
7 weight."

8 (Ex. 10 at 23).

9 The ALJ is not accurate. All examiners performed multiple
10 tests and the results are detailed in all four reports. In
11 addition, Dr. Malley's reports state:

12 "Basis is determined on objective data if ratings are
13 moderate, marked or severe

14 (a) Depressed mood: Rating: Marked: Based on MMPI-2 profile and
15 behavioral observations"

16 (Ex. 10 at 254).

17 The basis for the conclusions is plainly stated. The ALJ's
18 reason is not supported by the record.

19 The only other explicit reason the ALJ offers for rejecting
20 the examiners' opinions is that they were given to determine
21 whether plaintiff is entitled to state benefits. This is not, by
22 itself, a specific legitimate reason to reject the examiners'
23 opinions. Although the ALJ states this is the reason he does not
24 give the opinions controlling weight, it is clear he does not give
25 them any weight at all.

26 Finally, the ALJ "finds that the record does not contain any
27 opinions from treating or examining sources indicating that the
28 claimant is disabled or even has limitations greater than those

1 determined in this decision" (ECF No. 10 at 23).

2 Again, the ALJ is incorrect. In April 2007, Dr. Dalley gave
3 plaintiff a current GAF of 35, indicating some impairment in
4 reality testing or communication, or major impairment in several
5 areas, such as work or school, family relations, judgment,
6 thinking or mood (ECF No. 10 at 254). About a year later, he
7 assessed a current GAF of 45, indicating serious symptoms or any
8 serious impairment in social, occupational, or school functioning
9 (ECF No. 10 at 299). In May 2009, Dr. Brown assessed a GAF of 51,
10 indicating moderate symptoms or difficulty functioning, and opined
11 mental health treatment was unlikely to restore plaintiff's
12 ability to work (ECF No. 10 at 392, 398). DSHS found plaintiff's
13 mental status prevents her from working (ECF No. 10 at 33). In
14 August 2009, plaintiff's counselor assessed a GAF of 51 (Ex. 10 at
15 538).

16 Because it is unclear whether plaintiff would be found
17 disabled if the opinions were properly considered, the error
18 requires remand for further proceedings.

19 The ultimate issue of disability and degree of residual
20 functional capacity must be made by the ALJ. *Reddick v. Chater*,
21 157 F.3d 715, 725 (9th Cir.1998).

22 Plaintiff bears the burden of showing that a legal error was
23 prejudicial. See *Shinseki v. Sanders*, 556 U.S. 396, 409-410
24 (2009). She has done so.

25 CONCLUSION

26 Having reviewed the record and the ALJ's conclusions, this
27 Court finds the ALJ's decision is not free of legal error and
28 supported by substantial evidence..

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